
Note

UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy

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They attack from beyond the horizon, approaching swiftly behind their target ships in small outboard skiffs, firing volleys of Kalashnikov rounds and rocket-propelled grenades to scare their victim-crews into submission before boarding.¹ When a group of pirates manages to board another ship, the crew will likely face a long ordeal before freedom comes again.² This modern scenario threatens lives, livelihoods, and global security, and no scholar or legal practitioner has yet proposed an effective solution to stem this violent tide.³ Although reminiscent of Blackbeard or the dreaded Barbary hordes, maritime piracy today—most notably off the shores of Somalia—exists in a legal context that presents an entirely new set of challenges.

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1. Cf. Fergal Keane, *British Captain's Somali Pirate Nightmare*, BBC NEWS, Jan. 19, 2010, <http://news.bbc.co.uk/2/hi/africa/8465770.stm>.

2. See, e.g., Sarah Childress, *Ship and Crew Are Docked; U.S. Navy Is in Standoff with Pirates*, WALL ST. J. ONLINE, Apr. 12, 2009, <http://online.wsj.com/article/SB123945093996811015.html?KEYWORDS=maersk+alabama>; Jonah Fisher, *Somali Pirate Patrol: Day One*, BBC NEWS, Feb. 19, 2009, <http://news.bbc.co.uk/2/hi/africa/7899898.stm> (“For [naval ships] to intervene[, they] have to actually arrive as an act of piracy is taking place.”).

3. See Robert D. Kaplan, Op-Ed., *Anarchy on Land Means Piracy at Sea*, N.Y. TIMES, Apr. 11, 2009, at WK9, available at 2009 WLNR 6839768; Nick Childs, *Navies Struggle with “Swarming” Pirates*, BBC NEWS, Apr. 1, 2010, <http://news.bbc.co.uk/2/hi/africa/8598726.stm>; Muhyadin Ahmed Roble, *Somalia: 11 Pirates Jailed 15 Years Each*, AFR. NEWS, Feb. 15, 2010, http://www.africanews.com/site/Somalia_11_pirates_jailed_15yrs_each/list_messages/30025.

Pirates today share the legal designation of their historic brethren as “enemies of all mankind,”⁴ which provides the historical justification for universal jurisdiction.⁵ However, the modern international laws relating to piracy form an array of overlapping and complex rules. The most significant treaty relating to piracy—the United Nations Convention on the Law of the Sea (UNCLOS)—limits the exercise of jurisdiction over suspected pirates transferred to a third-party state from the state that captures them on the seas.⁶

Consequently, international law discourages many states from combating this new wave of piracy because they have yet to discover how to balance the various obligations and tools, which they sometimes interpret as contradictory.⁷ Such uncertainty led to a standard practice of transferring captured pirates to nearby states for trial,⁸ or setting them free.⁹ Yet UNCLOS provisions and drafting notes prohibit such practices,¹⁰ and appear to favor the jurisdictional claims of third-party

4. See Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 28 (2007) (explaining that the *Achille Lauro* hijackers were *hostis humani generis*).

5. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 190–92 (2004).

6. See United Nations Convention on the Law of the Sea art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

7. See Bahar, *supra* note 4, at 6 (“[C]ontrary to the assertions of many commentators, authors, and practitioners, sufficient international law exists to enable the military and diplomats to counter piracy . . .”). *Contra* Douglas R. Burgess, Op-Ed., *Piracy Is Terrorism*, N.Y. TIMES, Dec. 5, 2008, at A33, available at 2008 WLNR 23389243 (“Today the world’s navies are hamstrung by conflicting laws and the absence of an international code.”).

8. See Jeffrey Gettleman, *Rounding Up Suspects, The West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES, Apr. 24, 2009, at A8, available at 2009 WLNR 7699213; David Morgan, *U.S. Delivers Seven Somali Pirate Suspects to Kenya*, REUTERS, Mar. 5, 2009, available at <http://www.reuters.com/article/idUSTRE52480N20090305>.

9. See, e.g., Press Release, Allied Mar. Command Headquarters Northwood, NATO Warship Esbern Snare Disrupts Pirates in the Gulf of Aden (Nov. 15, 2010), available at <http://www.manw.nato.int/pdf/Press%20Releases%202010/Jun%20-%20Dec%202010/SNMG1/HDMS%20ESBERN%20SNARE%20disrupts%20pirates%20in%20the%20Gulf%20Of%20Aden.pdf> (“The suspected pirates were taken onboard ESBERN SNARE for questioning and evidence was collected . . . [T]he suspected pirates were . . . issued a low-power outboard motor rendering the skiff useless for piracy.”).

10. UNCLOS, *supra* note 6, art. 105 (“The courts of the state which carried out the seizure may decide upon the penalties to be imposed . . .”); 2 INT'L LAW COMM'N, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION art. 43 cmt. (1956), available at <http://untreaty.un.org/ilc/publications/yearbooks/>

states based on universality over those of states with real ties to the crime. This developing practice threatens the status of UNCLOS as a codification of customary international law.¹¹ States acting in contravention of their treaties hinder the emergence of an effective solution to the dangerous and costly global maritime piracy problem.

This Note examines the pressing need for a coherent solution to these jurisdictional complications. Part I considers modern maritime piracy, its history, and the relevant instruments of international law. Part II evaluates the myriad of responses to piracy in terms of international norms and agreements in order to determine whether current responses comply with international law. Part III argues that criminal proceedings should occur in the state with the strongest jurisdictional claim—despite the UNCLOS proscription—and proposes a framework to balance the convergent legal forces surrounding piracy. This Note concludes that transfers of suspected pirates to third-party states, although not preferred, are entirely legal under international law, suggesting that UNCLOS will require reinterpretation or amendment of its piracy provisions in order to remain relevant.

I. THE EVER-PRESENT PIRACY THREAT AND ITS LEGAL FOILS

Acts of piracy did not historically involve a unique type of criminal act, but simply a unique location.¹² States and international bodies throughout the ages defined piracy in many different ways. The U.S. Constitution gives Congress the power to “define and punish” piracy on the high seas.¹³ Congress’s anti-piracy statutes throughout history deferred to the law of na-

Ybkvolumes(e)/ILC_1956_v2_e.pdf (“This article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. This right cannot be exercised at a place under the jurisdiction of another State.”).

11. See *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) (explaining that the baseline provisions of UNCLOS reflect customary international law); *Sarei v. Rio Tinto*, 487 F.3d 1193, 1210, 1078 (9th Cir. 2007) (reiterating UNCLOS’s status as a codification of custom, but refusing to hold that these norms have become *jus cogens*); *R. v. Rimbaut* (1998), 202 N.B.R. 2d 87, para. 12 (Can. N.B. Q.B.) (holding UNCLOS article 111 as declaratory of international custom).

12. *E.g.*, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 160 (1795) (“What is called robbery on the land, is piracy if committed at sea.”).

13. U.S. CONST. art. I, § 8, cl. 10.

tions to define these crimes.¹⁴ Determining what constituted piracy under the law of nations often garnered inconsistent results. Courts frequently found that the definition consisted of plundering or “depredating on the high seas.”¹⁵ These crimes represented the high seas analogue to criminal thefts on land.¹⁶ In this vein, piracy under the law of nations recently came to encompass, in addition to depredation, “any illegal acts of violence or detention” on the high seas or “outside the jurisdiction of any State.”¹⁷

It appears that piracy might once again require revisions to its definition. Crimes committed at sea today appear to clearly constitute piracy, but in fact bear some significant differences. As a result, the laws that developed in response to this problem, namely universal jurisdiction, now come into conflict with new instruments of maritime law. Highlighting the severity of the piracy problem will demonstrate the need for a serious examination of the legal tools available to address it.

A. THE PIRACY PROBLEM

The first recorded incidents of piracy occurred in ancient times.¹⁸ Although the offense itself bore several definitions over time,¹⁹ punishment of crimes at sea that were considered piracy remained consistently swift and decisive throughout history.²⁰ Responses to piracy today bear neither of these traits, partly because modern pirates operate in very different ways. Piracy

14. 18 U.S.C. § 1651 (1948); *see also* United States v. Smith, 18 U.S. (5 Wheat.) 153, 154 (1820) (discussing Congress’s deferral to the law of nations in defining and punishing acts of piracy).

15. *The Ambrose Light*, 25 F. 408, 412 (S.D.N.Y. 1885) (citing Dana’s *Wheaton International Law* § 122); *accord Smith*, 18 U.S. (5 Wheat.) at 153.

16. *See Talbot*, 3 U.S. (3 Dall.) at 160; *cf.* *The Malek Adhel*, 43 U.S. (2 How.) 210, 232–33 (1844) (noting that seizure alone is enough to constitute piracy even without an actual theft).

17. UNCLOS, *supra* note 6, art. 101. *Contra* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 184 (1820) (distinguishing the crime of piracy from that of murder).

18. WAYNE SANDHOLTZ & KENDALL STILES, *INTERNATIONAL NORMS AND CYCLES OF CHANGE* 32–33 (2009); H.E. José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT’L J. MARINE & COASTAL L. 363, 364 (2003).

19. *Compare Talbot*, 3 U.S. (3 Dall.) at 160 (defining piracy as robbery on the high seas), *with The Ambrose Light*, 25 F. at 412 (defining piracy more broadly as “degradations on the high seas”).

20. *See, e.g.,* *The Mariana Flora*, 24 U.S. (11 Wheat.) 1, 40–41 (1825); Kontorovich, *supra* note 5, at 190 (explaining the former practice of controlling pirates through capture, trial, or summary execution on the high seas).

today includes new tactics employed to carry out a crime pre-dating recorded history. Speedboats and Kalashnikovs, rather than frigates and cutlasses, recently became the pirate's weapons of choice.²¹ While looting cargo or stealing ships outright remain standard practice, Somali pirates today also kidnap sailors for ransom.²² The new face of this historic crime exacts worldwide human and financial costs, and poses an existential challenge to the piracy laws developed throughout the centuries.

As with ancient civilizations fighting for survival against the pirate scourge,²³ the proliferation of piracy today poses drastic economic and security threats. The sudden increase in attacks on ships sailing through vital shipping routes in the Gulf of Aden, and before it the Malacca Strait in Asia, became popular topics for the media in recent years.²⁴ In Malacca, the proximity of territorial seas belonging to functional governments permitted successful responses to greatly reduce the incidence of robberies and killings at sea.²⁵ In contrast, pirates roving the Gulf of Aden, and now expanding far into the Indian Ocean,²⁶ hail with few exceptions from the failed state of Soma-

21. Joshua Michael Goodwin, Note, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT'L. L. 973, 982 (2006).

22. Jeffrey Gettleman, *Pirates Tell Their Side: They Want Only Money*, N.Y. TIMES, Oct. 1, 2008, at A1, available at 2008 WLNR 18637664.

23. Pirates plagued the coasts of ancient Greece. SANDHOLTZ & STILES, *supra* note 18, at 32; Jesus, *supra* note 18, at 364. The Romans battled pirates and marauders from the sea almost constantly. *Id.* Even the great Julius Caesar reportedly fell captive to pirates. 2 PLUTARCH, THE LIVES OF THE NOBLE GRECIANS AND ROMANS 200 (Arthur Hugh Clough ed., Dryden trans., 1992); SUETONIUS, THE LIVES OF THE TWELVE CAESARS: AUGUSTUS 4 (1931). China also endured a chronic infestation of pirates in its waters. Bahar, *supra* note 4, at 11 n.31.

24. See, e.g., Derek S. Reveron, *Think Again: Pirates*, FOREIGN POL'Y, Jan. 12, 2009, http://www.foreignpolicy.com/articles/2009/01/11/think_again_pirates; *Somali Pirates Wreak Havoc with Maritime Traffic*, ALLIED FOREIGN PRESS, Sept. 14, 2008, http://afp.google.com/article/ALeqM5hZYx9sbzOMTKG3bDs8y_ZWxXONSA.

25. See Jesus, *supra* note 18, at 366, 369 (describing the problem and responses in the Malacca Strait); cf. Tammy M. Sittnick, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, 14 PAC. RIM L. & POL'Y. J. 743, 752-56 (2005).

26. Jonathan Saul, *Somali Pirates Widening Attack Area: U.S. Admiral*, REUTERS, Mar. 25, 2010, available at <http://af.reuters.com/article/topNews/idAFJOE62O0LY20100325>.

lia.²⁷ The formerly robust democracy is now unable to police its waters or effectively cooperate with concerned neighbors or other states.²⁸ This power vacuum on land and sea permitted poor fishermen, farmers, teenagers, and clan leaders to take to the seas and throw international shipping into a dangerous and expensive crisis.²⁹

The International Maritime Organization (IMO) reported sixty pirate attacks on ships off the coast of East Africa during 2007,³⁰ between 134 and 153 attacks during 2008,³¹ and 222 in 2009.³² This trend took a promising turn in 2010, perhaps due to naval intervention, but pirates are rational criminals who will find new ways to ply their trade despite such efforts.³³ The number of pirate attacks off East Africa decreased, but incidents increased further out to sea, with substantially more attacks in both the Indian Ocean and the Arabian Sea.³⁴ Worse still, many attacks go unreported.³⁵ Thus, the human cost of

27. Roger Middleton, *Piracy in Somalia: Threatening Global Trade, Feeding Local Wars*, CHATHAM HOUSE, 3 n.2 (Oct. 2008), http://www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf.

28. Will Ross, *Somali Navy Chief: World's Worst Job?*, BBC NEWS, June 16, 2009, <http://news.bbc.co.uk/2/hi/africa/8096137.stm>; see also S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/N08/361/77/PDF/N0836177.pdf>; Press Release, Sec. Council, Security Council Authorizes States to Use Land-Based Operations in Somalia as Part of Fight Against Piracy Off Coast, Unanimously Adopting 1851, U.N. Press Release SC/9541 (Dec. 16, 2008), available at <http://www.un.org/News/Press/docs/2008/sc2008/sc9541.htm>.

29. See Bahar, *supra* note 4, at 67.

30. INT'L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT – 2007, at 1 (2008), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D22585/115.pdf.

31. INT'L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT – 2008, at 1 (2009), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25550/133.pdf.

32. INT'L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT – 2009, at 2 (2010), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D28158/152.pdf.

33. See Peter T. Leeson, *Rationality, Pirates, and the Law: A Retrospective*, 59 AM. U. L. REV. 1219, 1225 (2010).

34. INT'L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: FIRST QUARTERLY REPORT – 2010, at 2 (2010), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D29096/153.pdf (“The areas affected over the period under review were, East Africa (35 incidents, down from 47 reported last quarter) . . .”).

35. DANIEL SEKULICH, TERROR ON THE SEAS: TRUE TALES OF MODERN-DAY PIRATES 142 (2009); Alexander S. Skaridov, *Hostis Humani Generis*, in LEGAL CHALLENGES IN MARITIME SECURITY 479, 485 (Myron H. Nordquist et al. eds., 2008).

these attacks in terms of trauma, fear, and physical harm or death is probably immeasurable. In terms of lost profits, not including ransoms paid, the International Maritime Bureau's estimates reached between \$13 and \$15 billion between the Indian and Pacific Oceans in 2006 alone.³⁶ Tragically, the economies of nearby states such as Kenya, whose port at Mombasa is an essential waypoint and income generator, will bear the brunt of this loss.³⁷ The increased risk of sending ships and crews into waters through which thirty percent of the world's marketed oil passes led to dramatic increases in insurance premiums that threaten to cripple the international shipping industry.³⁸ Moreover, the potential inroads for terrorism in this burgeoning criminal activity raise serious security concerns.³⁹ Though some commentators advocated for a holistic assessment of the situation and its potential solutions,⁴⁰ journalists and citizens called for a decisive response to the piracy problem,⁴¹ and, as a result, several governments sent in their navies.⁴²

The historical struggle between states and pirates often evolved as political attitudes towards piracy developed.⁴³ Initial

36. Bahar, *supra* note 4, at 4.

37. Sayyid Azim, *African Businesses Hit Hard; Tourists Scared Off by Pirates*, SOMALILAND TIMES, Nov. 13, 2005, <http://www.somalilandtimes.net/200/27.shtml>.

38. See Osvaldo Peçanha Caninas, *Modern Maritime Piracy: History, Present Situation and Challenges to International Law 21* (July 22, 2009) (unpublished manuscript), available at http://www.allacademic.com/one/isa-abri/meeting09/index.php?click_key=1&PHPSESSID=a91b9ad6ff10db53a5c6c156420e265b; Mary Harper, *Life in Somalia's Pirate Town*, BBC NEWS, Sept. 18, 2008, <http://news.bbc.co.uk/2/hi/africa/7623329.stm>; Middleton, *supra* note 27, at 3 (explaining the importance of the Gulf of Aden, through which "[s]ome 16,000 ships a year pass," to international trade); cf. Burgess, *supra* note 7, at A39 ("In a trial before the Old Bailey in 1696, Dr. Henry Newton, the Admiralty advocate, declared, 'Suffer pirates and the commerce of the world must cease.'").

39. Bahar, *supra* note 4, at 5; Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International War*, 33 TUL. MAR. L.J. 3, 3 n.10 (2008).

40. Kaplan, *supra* note 3, at WK9; Roger Middleton, *Piracy Symptom of Bigger Problem*, BBC NEWS, Apr. 15, 2009, <http://news.bbc.co.uk/2/hi/africa/8001183.stm>; Johann Hari, *You Are Being Lied to About Pirates*, HUFFINGTON POST (Jan. 4, 2009, 8:55 AM), http://www.huffingtonpost.com/johann-hari/you-are-being-lied-to-abo_b_155147.html.

41. Colloquim, *Room for Debate: Capture Pirates, on Land and Sea*, N.Y. TIMES ROOM FOR DEBATE (Apr. 9, 2009, 7:44 PM), <http://roomfordebate.blogs.nytimes.com/2009/04/09/capture-pirates-on-land-and-sea/>.

42. Frank Gardner, *Taking on Somalia's Pirates*, BBC NEWS, Feb. 11, 2009, <http://news.bbc.co.uk/2/hi/africa/7882618.stm>; *Japan to Deploy Ships Off Somalia*, BBC NEWS, Jan. 28, 2009, <http://news.bbc.co.uk/2/hi/africa/7855120.stm>.

43. See FREDERICK C. LEINER, *THE END OF BARBARY TERROR: AMERICA'S*

military responses to this new phenomenon were swift,⁴⁴ and became more sophisticated over time,⁴⁵ but the twentieth century contributed legal problems that make these responses anything but decisive. While meeting these violent crimes with force can likely reduce their frequency,⁴⁶ this essential response requires a robust legal counterpart in order to have a lasting deterrent effect.

B. ADRIFT IN THE LEGAL DOLDRUMS OF OLD AND NEW LAWS

Despite the long-standing tradition of states extending their judicial reach beyond the confines of their own territory, those who capture pirates today must assess their legal positions carefully. The existence of true universal jurisdiction now appears illusory from the perspectives of both history and modern practice. Other forms of jurisdiction require connections to the alleged crime that are not always present. In addition, many states now have treaty obligations under UNCLOS, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), or both that complicate decisions about what to do with suspected pirates. The interplay of jurisdictional regimes and laws of the sea requires careful consideration.

1. Jurisdiction over Piracy

States have a wide range of legal tools available to apply their domestic laws to pirates—who, by definition, committed their crimes outside any state's sovereign territory⁴⁷—including

1815 WAR AGAINST THE PIRATES OF NORTH AFRICA 49–51 (2006) (describing the U.S. decision to wage war against Tripoli, rather than adjudicate captured pirate vessels in American courts); Caninas, *supra* note 38, at 4 (describing the end of the privateering practice).

44. Josh Meyer, *Snipers Kill Pirates in Dramatic Rescue*, CHI. TRIB., Apr. 13, 2009, at 1, available at 2009 WLNR 6874418; Graham Bowley, *Pirate 'Mother Ship' or Thai Trawler?*, N.Y. TIMES LEDE BLOG (Nov. 28, 2008, 1:05 PM), <http://thelede.blogs.nytimes.com/2008/11/25/pirate-mother-ship-or-thai-trawler/?scp=2&sq=pirate&st=cse>.

45. Will Ross, *Drones Scour the Sea For Pirates*, BBC NEWS, Nov. 10, 2009, <http://news.bbc.co.uk/2/hi/africa/8352631.stm>; Joseph Schuman, *NATO Sends in Stealth Sub to Combat African Pirates*, AOL NEWS (June 29, 2010), http://www.hiiran.com/news2/2010/Jun/nato_sends_in_stealth_sub_to_combat_african_pirates.aspx?flv=1.

46. See Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments Off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 412–14 (2009).

47. UNCLOS, *supra* note 6, art. 101(a)(i)–(ii).

extraterritorial and even universal jurisdiction.⁴⁸ The flag state of a ship attacked or used by pirates can still assert territorial jurisdiction, because any ship flying a sovereign's flag remains part of its territory, even if the surrounding seas are not.⁴⁹ When states lack exclusive power to prosecute based on the location of the crime, they require a basis for exercising jurisdiction extraterritorially.⁵⁰

States may use three essential bases of extraterritorial jurisdiction to establish a nexus between themselves and illegal acts of piracy occurring completely outside their territory. First, a state can exercise jurisdiction based on the nationality of the suspected offender, if he or she is a citizen of that state.⁵¹ Second, exercising jurisdiction by passive nationality allows a state to prosecute based on the nationality of the victim.⁵² Finally, the protective principle gives a state jurisdiction over crimes that endanger its security or other national interests.⁵³

In the United States, courts use a two-part test to determine the appropriateness of any exercise of extraterritorial jurisdiction.⁵⁴ They consider whether Congress intended to permit extraterritorial application of a given statute, and whether such application would be reasonable under international law.⁵⁵ Congressional intent often reveals itself in the type of crime Congress sought to prevent or in the text of the statute.⁵⁶ Courts find their exercises of extraterritorial jurisdiction valid under the second element of this inquiry when they conform to

48. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

49. UNCLOS, *supra* note 6, art. 92.1; Convention on the High Seas art. 6.1, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 [hereinafter High Seas]; see also *United States v. Flores*, 289 U.S. 137, 155–56 (1933) (“[A] merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty.” (citing *United States v. Rodgers*, 150 U.S. 264 (1893))); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402 cmt. h, 502 (1987).

50. SANDHOLTZ & STILES, *supra* note 18, at 45.

51. MARIA GAVOUNELI, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA 6 (2007); SANDHOLTZ & STILES, *supra* note 18, at 44–45.

52. GAVOUNELI, *supra* note 51, at 7.

53. *Id.* at 6.

54. *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002).

55. *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991) (citing *United States v. Bowman*, 260 U.S. 94, 98 (1922)).

56. *Bowman*, 260 U.S. at 97–98.

international principles of extraterritorial jurisdiction.⁵⁷ While this part of the test may appear redundant, courts probably find it necessary to ensure that domestic practices of applying jurisdiction extraterritorially follow the generally accepted international norms.

Because these jurisdictional claims may exist when a state's vessel, victim, offender, or security interests are affected within another sovereign's territorial waters, the second part of this judicial test might also require an assessment of potential concurrent jurisdictional claims. United States courts maintain that their exercise of jurisdiction as the flag state of American vessels sailing in foreign waters exists only subject to the territorial sovereign's interest in securing its ports.⁵⁸ Accordingly, if the territorial sovereign makes a concurrent claim of jurisdiction, at least over serious crimes committed within its waters, such a claim takes precedent over any flag-state or extraterritorial jurisdiction claims by other sovereigns.⁵⁹

The difficulties associated with establishing a viable claim to jurisdiction over acts of piracy may have led to the advent of universal jurisdiction.⁶⁰ This legal doctrine provided jurisdiction for any state over acts of piracy "with which they have no direct connection."⁶¹ States ostensibly based universal jurisdiction on the premise that piracy is an act of such heinousness that pirates are *hostis humanis generis*, or enemies of all mankind.⁶² Because pirates committed their crimes beyond the law of nations, they placed themselves "beyond the protection of any State."⁶³ As enemies of all mankind, pirates attracted the ire of all nations wherever they emerged.⁶⁴ It appears that the substantial political will and military ability of the international community to combat piracy at the time inspired this robust

57. See, e.g., *Felix-Gutierrez*, 940 F.2d at 1205-06; *Chua Han Mow v. United States*, 730 F.2d 1308, 1311-12 (9th Cir. 1984).

58. See *United States v. Flores*, 289 U.S. 137, 157 (1933); cf. UNCLOS, *supra* note 6, art. 27.

59. *Flores*, 289 U.S. at 157-58 (citing *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 14-19 (1887)).

60. See *Bahar*, *supra* note 4, at 15.

61. *Id.* at 13.

62. Kontorovich, *supra* note 5, at 233.

63. *In re Piracy Jure Gentium*, [1934] A.C. 586 at 589 (Eng.); see also SANDHOLTZ & STILES, *supra* note 18, at 46.

64. See 4 WILLIAM BLACKSTONE, COMMENTARIES *71.

legal instrument.⁶⁵ As a result, any state trying pirates had ample authority to do so under international law.

However, legitimate doubts about the genuine origins of this ignominious designation abound.⁶⁶ Scholars claim that the justifications for creating universal jurisdiction to combat piracy do not withstand academic scrutiny.⁶⁷ Although the heinousness of the crime purportedly supports the right of all states to punish it, piracy was not historically—nor is it now—considered particularly heinous in comparison to torture or murder.⁶⁸ Even if these reasons were valid at one time, they might not apply as well today. For example, pirates historically became stateless men sailing in stateless ships by the nature of their crimes, but modern laws such as UNCLOS abrogate this automatic expatriation.⁶⁹

Regardless of whether members of the international community were serious about their protestations against piracy, they rarely ever used universal jurisdiction to try suspected pirates.⁷⁰ Yet universal jurisdiction for piracy provided the fundamental justification for modern extensions of universal jurisdiction to internationally deplored crimes such as genocide, torture, war crimes, and crimes against humanity.⁷¹ These jurisdictional forms comprise the set available to both states and international instruments in confronting maritime piracy.

2. Laws of the Sea

The Geneva Convention on High Seas (Geneva LOS) and the later UNCLOS govern most international responses to pi-

65. SANDHOLTZ & STILES, *supra* note 18, at 37.

66. *See generally* Kontorovich, *supra* note 5, at 233 (arguing that heinousness could not serve as the foundation of universal jurisdiction for piracy because the crime of piracy was not actually considered particularly heinous); Goodwin, *supra* note 21, 987–1001 (echoing Kontorovich’s arguments).

67. *See* Kontorovich, *supra* note 5, at 233.

68. *Id.* at 186; Goodwin, *supra* note 21, at 995–96.

69. Goodwin, *supra* note 21, at 988–89.

70. *E.g.*, Alfred P. Rubin, *Revising the Law of “Piracy”*, 21 CAL. W. INT’L L.J. 129, 133 (1991); *cf.* 18 U.S.C. § 1651 (1946) (providing jurisdiction over piracy suspects “brought into or found in the United States,” but not those found anywhere in the world); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (“Although international law is law of the United States[,] . . . a person cannot be tried in the federal courts for an international crime unless Congress adopts a statute to define and punish the offense.”); 44B AM. JUR. 2D *International Law* § 70 (2007) (listing no criminal cases against suspected pirates applying universal jurisdiction); Brian L. Porto, Annotation, *Extraterritorial Criminal Jurisdiction of Federal Courts*, 1 A.L.R. FED. 415, 415 (2005).

71. Kontorovich, *supra* note 5, at 186.

racy today.⁷² The Geneva LOS and UNCLOS provisions on piracy are nearly identical, using the same or very similar language to obligate all parties to fight piracy cooperatively.⁷³ They each define piracy as illegal acts of violence, detention, or depredation on the high seas or outside any state's jurisdiction.⁷⁴ Additionally, this definition "corresponds to the common expression that a pirate is *hostis humanis generis*" and limits its scope to acts having "private ends," excluding politically motivated acts.⁷⁵

The United States did not sign UNCLOS,⁷⁶ but remains a party to Geneva LOS.⁷⁷ UNCLOS superseded the Geneva LOS conventions as to parties of both treaties.⁷⁸ Those parties include the major players in the fight against maritime piracy. Somalia, Kenya, Seychelles, Yemen, Denmark, France, Germany, the United Kingdom, China, India, and Japan are all parties to UNCLOS.⁷⁹ Indeed, UNCLOS currently has 160 state parties,⁸⁰ a sufficiently large proportion of all states for it to constitute a codification of customary international law.⁸¹ Additionally, submission for ratification gives UNCLOS force as between the United States and other state parties, and the Unit-

72. UNCLOS, *supra* note 6, art. 1; High Seas, *supra* note 49, art. 1.

73. Compare UNCLOS, *supra* note 6, art. 100 ("All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."), with High Seas, *supra* note 49, art. 14 ("All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.").

74. UNCLOS, *supra* note 6, art. 101; High Seas, *supra* note 49, art. 15.

75. SATYA N. NANDAN & SHABTAI ROSENNE, 3 UNITED STATES CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY art. 101.8a (Myron H. Nordquist ed., 1995).

76. 2 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL ch. XXI, § 6 (2009), available at http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSGStatus/pageIntro_en.xml (indicating that the United States has not signed UNCLOS).

77. *Id.* § 2 (indicating that the United States ratified Geneva LOS on April 12, 1961).

78. UNCLOS, *supra* note 6, art. 311.4.

79. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *supra* note 76, ch. XXI, §§ 1–6.

80. *Id.*

81. *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1082 (9th Cir. 2006) (explaining that ratification by "at least 149" states at the time was "sufficient for [UNCLOS] to codify customary international law," but noting that it was not certain that the norms represented in UNCLOS were nonderogable *jus cogens*). *Contra* Rubin, *supra* note 70, at 136–37.

ed States has stated its intention to respect the rules of UNCLOS on “navigation and other matters.”⁸²

UNCLOS article 105 gives every state the right to capture suspected pirates and permits the courts of the capturing state to determine their penalty.⁸³ As with the other UNCLOS provisions, article 105 closely mirrors its Geneva LOS counterpart, article 19.⁸⁴ The language permitting any state to capture and try pirates in its courts reflects universal jurisdiction principles.⁸⁵ Yet it appears to impose some limits. This is the essential issue surrounding maritime piracy today. Each article says “[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed.”⁸⁶ The permissive “may” applies *expressio unius* to the seizing state’s courts only. Furthermore, the Commission’s commentary to draft article 43, which corresponds to Geneva LOS article 19, cryptically explained that “[t]his article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts,”⁸⁷ and that “[t]his right cannot be exercised at a place under the jurisdiction of another State.”⁸⁸

Opinions differ on whether this comment limits the exercise of universal jurisdiction to the capturing state, reiterates the prohibition against seizing vessels in another state’s territorial waters,⁸⁹ or merely implies that courts in the capturing state will apply their own domestic law, including that on conflict of laws.⁹⁰ The official meaning of this language is crucial since it reads as a proscription of the transfers so widely practiced today. Whether these practices put states in contraven-

82. *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2d 1358, 1372 (S.D. Fla. 1998). *Contra United States v. Best*, 304 F.3d 308, 320 (3d Cir. 2002) (holding that failure to ratify UNCLOS denies it the force of law within the United States).

83. UNCLOS, *supra* note 6, art. 105.

84. *Compare* UNCLOS, *supra* note 6, art. 105 (stating the right of a state to seize a pirate ship or a ship taken by pirates), *with* High Seas, *supra* note 49, art. 19 (same).

85. NANDAN & ROSENNE, *supra* note 75, art. 105.10(a).

86. UNCLOS, *supra* note 6, art. 105; High Seas, *supra* note 49, art. 19.

87. INT’L L. COMM’N, *supra* note 10, art. 43.

88. *Id.*

89. J. Ashley Roach, *Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT’L L. 397, 404 (2010).

90. *Compare* NANDAN & ROSENNE, *supra* note 75, art. 105.10(c) (detailing the limits of universal jurisdiction in piracy prosecution), *with* Eugene Kontorovich, “A Guantanamo on the Sea”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 248, 259 (2010) (discussing the possibility of applying one’s own domestic law in pirate prosecution).

tion of customary international law and their own treaty commitments, or weaken UNCLOS as a codification of custom, thus remains uncertain.

UNCLOS parties would have several options if they desired to clarify this point. The International Tribunal for the Law of the Sea (ITLOS) has competence to issue an advisory opinion on the provision's meaning.⁹¹ However, ITLOS lacks competence to try suspected pirates themselves.⁹² Despite calls to permit such trials through amendment to the statute of ITLOS or additional UNCLOS protocols,⁹³ converting a judicial body initially designed to settle interpretive disputes among states relating to UNCLOS into a criminal tribunal remains unprecedented and impractical.⁹⁴ UNCLOS article 105 would nonetheless preclude this possibility at ITLOS and other international courts, such as the International Criminal Court, which also lack the mandate to hear piracy cases.⁹⁵ Parties could alternatively amend UNCLOS to suit their needs through formal procedure by convening a consensus-seeking conference, or through simplified procedure, followed by adoption of an amendment and signature, ratification, or accession to it.⁹⁶

SUA overlaps with UNCLOS, and may provide a stopgap in some areas.⁹⁷ Created in response to the horrific hijacking of the *Achille Lauro* in 1985,⁹⁸ SUA applies primarily to terror-

91. *Proceedings and Cases – Competence*, INT'L TRIBUNAL L. SEA, http://www.itlos.org/proceedings/competence/decisions_start_en.shtml (last visited Apr. 29, 2011) (“The Tribunal has jurisdiction over any dispute . . . concerning the interpretation or application of the Convention.”).

92. Press Release, Clarification, ITLOS/Press 135 (Apr. 24, 2009) (“[The ITLOS] is not a criminal court and has no competence to try pirates.”). *Contra Kenya Prosecutors Charge Suspected Somali Pirates*, RADIO NETH. WORLDWIDE (May 24, 2009), <http://www.rnw.nl/int-justice/article/kenya-prosecutors-charge-suspected-somali-pirates> (click “general information”) (“The president of the UN-sponsored International Tribunal for the Law of the Sea in Germany, Luis Jesus, said that body is ready to take piracy cases.”).

93. E.g., Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AM. U. L. REV. 1267, 1273, 1314 (2010).

94. *General Information – Overview*, INT'L TRIBUNAL L. SEA, http://www.itlos.org/start2_en.html (last visited Apr. 29, 2011).

95. Cf. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 37 I.L.M. 999, 1003–04 (listing the court's competence over only crimes of genocide, crimes against humanity, war crimes, and aggression).

96. UNCLOS, *supra* note 6, arts. 306–07, 312–13, 315–16.

97. See Eugene Kontorovich, *International Legal Responses to Piracy Off the Coast of Somalia*, ASIL INSIGHTS (Feb. 6, 2009), <http://www.asil.org/insights/090206.cfm> (explaining the jurisdictional concerns with prosecuting piracy).

98. PRESIDENT OF THE U.S., PROTOCOLS OF 2005 TO THE CONVENTION CONCERNING SAFETY OF MARITIME NAVIGATION AND TO THE PROTOCOL

ism.⁹⁹ Like UNCLOS, it has a large number of state parties, including the United States,¹⁰⁰ though Somalia did not join.¹⁰¹

SUA does not cover theft, the penultimate requirement of a piracy definition.¹⁰² Yet offenses under SUA include conduct such as hijacking, acts of violence, and terrorism.¹⁰³ SUA requires that state parties attempt to establish jurisdiction through extraterritoriality over any person on a ship that will travel, is travelling, or has travelled on the high seas and who attempts, abets, or actually seizes a ship by force or intimidation.¹⁰⁴ Most importantly, SUA applies in territorial waters.¹⁰⁵ Its so-called extradite-or-punish provisions permit the transfer of suspected offenders to other state parties, who establish the strongest connection to an incident through extraterritorial jurisdiction or jurisdiction according to their domestic laws.¹⁰⁶

The magnitude of the piracy problem in one of the world's most significant shipping lanes necessarily calls for robust international action to utilize the varied and powerful legal tools designed to combat piracy. The availability of territorial, extraterritorial, and universal jurisdiction along with domestic anti-piracy laws and international instruments such as UNCLOS and SUA give the impression of a comprehensive and decisive legal regime. Pirates do not appear to stand a chance. On the contrary, they continue to hunt the Gulf of Aden and Indian Ocean while the world powers trip over their treaties.¹⁰⁷ Mod-

CONCERNING SAFETY OF FIXED PLATFORMS ON THE CONTINENTAL SHELF, at VI (2007).

99. Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation pmbl., Mar. 10, 1988, 27 I.L.M. 668 [hereinafter Convention for the Suppression of Unlawful Acts].

100. 18 U.S.C. § 2280 (1996); INT'L MARITIME ORG., STATUS OF CONVENTIONS (2011), available at http://www.imo.org/Conventions/mainframe.asp?topic_id=248.

101. Convention for the Suppression of Unlawful Acts, *supra* note 99.

102. *See id.* art. 3.

103. *Id.*

104. *Id.* arts. 1, 4, 6.

105. *Id.* art. 4.

106. *Id.* arts. 6, 8, 10; Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 282 (1988); *see also* S.C. Res. 1851, pmbl., U.N. Doc. S/RES/1851 (Dec. 16, 2008) (discussing piracy transfers and jurisdictional issues).

107. *See, e.g., Kenya to Help Navy Chase Pirates*, COPENHAGEN POST, Aug. 18, 2009, <http://www.cphpost.dk/news/international/89-international/46605-kenya-to-help-navy-chase-pirates.html> (“[T]he Danish navy release[d] 10 captured pirates because no country would accept them for trial.”).

ern responses to piracy—both at the point of capture and at trial—must use the available legal tools such as UNCLOS to their advantage rather than straining against them, or states risk undermining them and further complicating an already complex area of law.

II. MODERN RESPONSES

The responses of most states to piracy in the Straits of Aden consist of deploying a significant military presence to the area to deter further attacks.¹⁰⁸ When navy ships apprehend suspected pirates they face the puzzling question of what to do with them.¹⁰⁹ As citizens of a failed state, sending Somali pirates home could be tantamount to granting amnesty or, conversely, subjecting them to severe reprisals.¹¹⁰ Bringing them to the territory of the capturing state presents messy logistics and high costs.¹¹¹ As a result, the United States and European Union prefer to arrange for trial and detention of suspects in Kenya or the Seychelles and express eagerness to explore similar options with other neighboring states.¹¹² As of April 2009

108. See Gardner, *supra* note 42 (discussing the EU's efforts to stop pirates with the military); *Japan to Deploy Ships off Somalia*, *supra* note 42 (discussing Japan's efforts to stop pirates with the military); Paul Reynolds, *Rules Frustrate Anti-Piracy Efforts*, BBC NEWS, Dec. 9, 2008, <http://news.bbc.co.uk/2/hi/africa/7735144.stm> ("There is already a small Flotilla of warships in the region from the US, UK, Canada, France, Turkey, Germany, Russia, and India, among others.").

109. Reynolds, *supra* note 108 ("[T]he issue of who will put pirates in trial is a legal minefield and yet to be resolved.").

110. Oliver Hawkins, *What to Do with a Captured Pirate*, BBC NEWS, Mar. 10, 2009, <http://news.bbc.co.uk/2/hi/7932205.stm>; Reynolds, *supra* note 108.

111. See *International Piracy on the High Seas: Hearing Before the Subcomm. on Coast Guard and Maritime Transportation of the H. Comm. on Transp. and Infrastructure*, 111th Cong. 6 (2009) (statement of William Baumgartner, Rear Admiral, U.S. Coast Guard) [hereinafter *International Piracy on the High Seas*] (discussing the complications of piracy prosecution).

112. See Exchange of Letters Between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy and Detained by the European Union-Led Naval Force (EUNAVFOR), and Seized Property in the Possession of EUNAVFOR, from EUNAVFOR to Kenya and for Their Treatment After Such Transfer, Mar. 6, 2009, 48 I.L.M. 751, 751 [hereinafter Exchange of Letters] (explicating how to transfer piracy suspects between countries); Matthew Saltmarsh, *Pirates Widen Range, Straining Naval Patrols*, N.Y. TIMES, Nov. 20, 2009, available at 2009 WLNR 23426387 ("Agreements signed by the European Union, Kenya and the Seychelles allow for processing of captured pirates in those countries. Europe has also discussed extending this to Tanzania.").

the United States had sent fifty-two suspects to Kenya.¹¹³ Yet Kenya's recent refusal to accept additional transferees highlights the need for states to address this problem comprehensively.¹¹⁴ Moreover, these transfers overlook the capturing states' potential obligations under UNCLOS, or Geneva LOS, to provide trial within their own jurisdictions.

A. CHASING AND CAPTURING SUSPECTED PIRATES

As in the golden age of piracy, powerful states today appear to recognize the efficiency of military deterrence. The multinational Combined Task Force 151, the Standing North Atlantic Treaty Organization (NATO) Maritime Group 2, the European Naval Force Somalia (EUNAVFOR), and naval ships from several other states all conduct counter-piracy missions in the Gulf of Aden and the Indian Ocean.¹¹⁵ In contrast to addressing the root causes of upsurges in pirate activity, navies can deploy quickly and provide some deterrence in the area that arguably produces immediate results. Indeed, they have captured and scared off dozens of pirates since arriving in the region in 2009.¹¹⁶ Yet despite the incredible amount of military resources dedicated to fighting this problem, it appears that states have not yet applied the commensurate legal resources to help the militaries perform their tasks and deter acts of piracy. From the pursuit and capture of pirates at sea to their prosecution in courts, current practices do not reveal a systematic application of the relevant international laws.

Several factors make naval patrols the only true legal and practical option.¹¹⁷ Only warships can seize pirates under UNCLOS,¹¹⁸ and the IMO strongly cautions against arming

113. Caninas, *supra* note 38, at 20.

114. *Kenya Ends Somali Pirate Trials*, BBC NEWS, Apr. 1, 2010, <http://news.bbc.co.uk/2/hi/africa/8599347.stm>.

115. Press Release, EU NAVFOR, Counter Piracy Commanders Meet in Gulf of Aden (Oct. 26, 2009), *available at* <http://www.eunavfor.eu/2009/10/counter-piracy-commanders-meet-in-gulf-of-aden/>.

116. *E.g.*, Press Release, Allied Mar. Command Headquarters Northwood, NATO Warship Disrupts Pirates in Gulf of Aden (Jan. 10, 2011), *available at* <http://www.manw.nato.int/pdf/Press%20Releases%202011/Press%20releases%20Jan-June%202011/SNMG2/100111%20SNMG2%202011%20001.pdf>.

117. *German Navy Foils Pirate Attack in Gulf of Aden*, N.Y. TIMES, Dec. 26, 2008, at A11, *available at* 2008 WLNR 24747926 (“[W]arships are now patrolling the vast Gulf of Aden”); Fisher, *supra* note 2 (explaining that the British frigate the HMS Northumberland and other ships in the EU taskforce “Atalanta” are “trying to cover an area of more than a million square miles”).

118. UNCLOS, *supra* note 6, art. 107; High Seas, *supra* note 49, art. 21.

merchant ship crews or carrying private security forces on-board because of the possibility for escalation of violence during pirate attacks.¹¹⁹ Moreover, Somalia lacks the power to control its own maritime territory, and so international antipiracy efforts necessarily do the job for it. The UNCLOS provisions that protect coastal states' sovereignty would hamper antipiracy efforts. Since UNCLOS permits the establishment of a state's territorial sea at the waters within twelve nautical miles from the coastal low-water line,¹²⁰ and Somalia is a signatory of the treaty,¹²¹ pirates operating in a vast area around Somalia's long coastline could theoretically harass and hijack ships with a manner of double impunity. States have thus gone to great lengths to address that obstacle. Yet safeguarding their ability to exercise jurisdiction in foreign territorial waters for enforcement purposes did not provide the broad and flexible adjudicative jurisdiction states today require.

The Somali Transitional Federal Government (TFG) and other semi-autonomous regions within Somalia are actively engaging with antipiracy efforts.¹²² Somalia went further than waiving its expulsion right under UNCLOS.¹²³ It actively requested international assistance to combat unlawful acts in its waters and piracy,¹²⁴ perhaps because it could not do so itself, but also because neither UNCLOS nor SUA would otherwise permit foreign navies to intervene in its waters.¹²⁵ The Security

119. INT'L MARITIME ORG., *PIRACY AND ARMED ROBBERY AGAINST SHIPS: RECOMMENDATIONS TO GOVERNMENTS FOR PREVENTING AND SUPPRESSING PIRACY AND ARMED ROBBERY AGAINST SHIPS 3* (2009), available at <http://www.imo.org/ourwork/security/docs/piracy%20and%20armed%20robbery/MS.C.1-Circ.1333.pdf> ("For legal and safety reasons, flag states should strongly discourage the carrying and use of firearms by seafarers for personal protection or for the protection of a ship.").

120. UNCLOS, *supra* note 6, arts. 3–4.

121. Status of the United Nations Convention on the Law of the Sea, UNITED NATIONS, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en (indicating that Somalia signed and ratified the Convention).

122. See, e.g., Press Release, Headquarters Allied Mar. Command Northwood, Minister of Puntland State of Somalia Visits NATO Flagship Puntland (Aug. 2, 2010), available at <http://www.manw.nato.int/pdf/Press%20Releases%202010/Jun%20-%20Dec%202010/SNMG2/SNMG2%202010%2031.pdf> (detailing attempts by NATO and Somali leaders to stop piracy).

123. UNCLOS, *supra* note 6, arts. 19, 30.

124. S.C. Res. 1851, *supra* note 106; S.C. Res. 1816, *supra* note 28.

125. E.g., Convention for the Suppression of Unlawful Acts, *supra* note 99, art. 7 ("[A]ny State Party in the territory of which the offender . . . is present shall . . . take him into custody." (emphasis added)).

Council subsequently passed a number of resolutions on the matter, which have authorized a robust use of military force.¹²⁶ Notably, Resolution 1816 provides authorization for foreign states cooperating with the TFG to enter its territorial waters for the purpose of repressing piracy, provided the TFG notifies the Secretary General in advance of the agreement.¹²⁷ Resolution 1950 provides the most recent extension of that permission from the date of its adoption.¹²⁸ Further, Resolution 1851 arguably extends that permission to land-based operations as well, which the French military has undertaken.¹²⁹

Most states rightly justify such activities in the territorial waters under their SUA ratification,¹³⁰ since UNCLOS covers only illegal acts on the high seas. Several of the Security Council resolutions cite the SUA as an important tool in fighting piracy.¹³¹ The United States also relies on its SUA implementation when trying suspected pirates and hijackers in its own courts.¹³² On the high seas, however, all states must adhere to UNCLOS. Yet they often fail to cite UNCLOS or universal jurisdiction in justification of their transfers to Kenya,¹³³ and sometimes do nothing amid confusion about which laws apply in this legal morass.¹³⁴ A systematic approach to the piracy

126. S.C. Res. 1851, *supra* note 106; S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1816, *supra* note 28.

127. S.C. Res. 1816, *supra* note 28, ¶ 7.

128. S.C. Res. 1950, U.N. Doc. S/RES/1950 (June 26, 2010).

129. S.C. Res. 1851, *supra* note 106; Crispian Balmer, *French Commandos Swoop After Pirates Free Hostages*, REUTERS, Apr. 11, 2008, available at <http://www.reuters.com/article/2008/04/11/us-france-somalia-pirates-idUSL1188558720080411>; Press Release, *supra* note 28 (publishing the statements of representatives from the United Kingdom, Belgium, the United States, South Africa, Germany, and India).

130. *International Piracy on the High Seas*, *supra* note 111, at 6.

131. S.C. Res. 1851, *supra* note 106.

132. See, e.g., Indictment at 1, United States v. Muse, No. 1:09-cr-00512-LAP (S.D.N.Y. May 19, 2009) (citing 18 U.S.C. § 2280 (1996)) (using SUA in a piracy trial). However, the piracy charge against Muse no longer stands. Ray Rivera, *Somali Man Pleads Guilty in 2009 Hijacking of Ship*, N.Y. TIMES, May 19, 2010, at A21, available at <http://www.nytimes.com/2010/05/19/nyregion/19pirate.html> (explaining that the prosecutor dropped the piracy charge in exchange for a guilty plea).

133. Exchange of Letters, *supra* note 112, at 751–59 (citing UNCLOS articles in an agreement for transfers, which UNCLOS arguably does not permit, and making no mention of SUA or universal jurisdiction).

134. See Hawkins, *supra* note 110 (“According to Rear Admiral Philip Jones, who heads the European Union’s piracy task force Operation Atalanta,

problem would recognize the importance of enforcing international law in both territorial waters and high seas, and thus provide for the proper use of SUA, UNCLOS, or domestic laws according to the location of an incident.

The news reports do not precisely state the interplay of these laws as the source of uncertainty, and also fail to mention a location where any given suspects were apprehended.¹³⁵ If the captures took place in Somali waters, then the confusion might surround the extent of the legal mandate afforded by the United Nations (U.N.) resolutions, or whether SUA and UNCLOS apply in territorial waters. On the high seas, UNCLOS stops short of prescribing universal jurisdiction or any SUA-type flexible mandate for jurisdictional options.¹³⁶ Thus, even with the territorial sea complication settled by the Security Council, prosecuting suspected pirates captured on the high seas remains a pressing legal problem.

B. LEGAL RECOURSE AGAINST PIRATES AFTER CAPTURE

Under UNCLOS and Geneva LOS, state parties arguably violate their obligations by failing to try suspected pirates themselves.¹³⁷ Yet current practice indicates preferences for transferring them elsewhere.¹³⁸ The parties to these conventions ignore the fact that they could also be violating the international law principle of *pacta sunt servanda*.¹³⁹ Because Somalia is a party to UNCLOS, these states could be exposing themselves to liability to Somali claims before ITLOS,¹⁴⁰ at

when a navy intervenes to stop a pirate attack, they often do not know whether the pirates they catch can be prosecuted.”)

135. *E.g., id.*

136. UNCLOS, *supra* note 6, art. 100.

137. *See id.* art. 100; High Seas, *supra* note 49, art. 6.1.

138. James Kraska & Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition Is the Strategy*, 45 STAN. J. INT'L L. 243, 262 (2009) (“The mandate issued by the European Union . . . grants warships . . . the authority . . . to arrest, detain, and *transfer* persons who have committed, or are suspected of having committed, acts of piracy” (emphasis added) (internal quotation marks omitted)).

139. This is the rule that agreements and stipulations, especially those contained in treaties, must be observed. BLACK'S LAW DICTIONARY (9th ed. 2009).

140. ITLOS has competence to hear disputes relating to the application or interpretation of UNCLOS. UNCLOS, *supra* note 6, art. 288. States have access to these dispute settlement procedures. Statute of the International Tribunal for the Law of the Sea art. 291, Dec. 10, 1982, 1833 U.N.T.S. 397, Annex VI, art. 20.

least for transfers conducted before the TFG requested U.N. assistance, which might have waived any claim it had.

Another problem with this practice involves its significant ramifications for the status of UNCLOS as a codification of customary international law. Currently, states violate the supposed prohibition of transfers with impunity. Objections to deviation from customary norms represent an essential aspect of the creation and maintenance of custom.¹⁴¹ But allowing a deviation from a supposed norm to go unchallenged raises questions about whether that norm truly represents “a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁴² If transfers become the new customary norm in this way, the law of the sea provisions will not become invalidated. In fact, treaty provisions prevail over customs that do not rise to the level of nonderogable *jus cogens*,¹⁴³ which UNCLOS has not.¹⁴⁴ Appeals to customary international law will thus fail to exempt states from the transfer prohibition. Still, unless UNCLOS and Geneva LOS parties change this practice or amend the convention to reflect it, transfers made against the article 105 prohibition threaten to render UNCLOS status as the quintessential document in this area questionable precisely when its strength is most needed. If logistical and other hindrances make trials in the capturing state difficult, then the option to collaborate with nearby states should remain open, and UNCLOS must adapt to that reality.

1. Trying Suspected Pirates at Home

The UNCLOS status as a codification of customary international law¹⁴⁵ certainly appears to face a challenge as a result of recent state practices. Even outside the context of transfers to third parties, the U.N. resolutions and relevant cases in the

141. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. I, ch. 1, introductory note (“In principle, law that has been generally accepted cannot be later modified unilaterally by any state . . . , but particular states and groups of states can contribute to the process of developing (and modifying) law by their actions as well as by organized attempts to achieve formal change.”).

142. *Id.* § 102.

143. JESWALD SALACUSE, *THE LAW OF INVESTMENT TREATIES* 44 (2010).

144. *Sarei v. Rio Tinto*, 456 F.3d 1069, 1086 (9th Cir. 2006).

145. See *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) (explaining that the baseline provisions of UNCLOS reflect customary international law); *Rio Tinto*, 456 F.3d at 1086 (reiterating UNCLOS’s status as a codification of custom, but refusing to hold that these norms have become *jus cogens*); *R. v. Rimbaut* (1998), 202 N.B.R. 2d 87, para. 12 (Can. N.B. Q.B.) (holding UNCLOS art. 111 as declaratory of international custom).

United States do not cite either law of the sea convention, but rely on SUA instead. The two most prominent cases even concerned events that occurred on the high seas, where Geneva LOS would also apply.¹⁴⁶ When the United States does not ratify UNCLOS, a treaty purporting to codify customary law, and then chooses not to cite its predecessor in applicable court decisions, this codification becomes more questionable.

The trend of favoring SUA appears to continue with the indictment of the surviving accused *Maersk Alabama* hijacker, Abduwali Abdukhadir Muse. Federal prosecutors in the Southern District of New York charged him with several counts of violating the Violence Against Maritime Navigation Act, the statute implementing SUA.¹⁴⁷ Since this hijacking occurred on the high seas, the apparent preference to apply SUA in domestic trials—rather than validate the UNCLOS requirement to capture and to prosecute in domestic courts—might also cast doubt upon the customary codification that UNCLOS purports to represent. It might establish a different general practice.

Journalists, officials, and scholarly commentators alike invoke the murky and unclear international laws surrounding this issue as barriers to domestic trials.¹⁴⁸ These excuses, if actually made by states, misstate the issue. Most capturing states have legislation criminalizing acts of piracy and affording jurisdiction over suspected pirates,¹⁴⁹ and some have used them.¹⁵⁰ However, others exhibited reluctance to exercise jurisdiction over pirates because of their unwillingness to bear the costs of investigation, trial, and imprisonment.¹⁵¹ Transfers of suspected pirates to Kenya, for example, do currently exceed the permissions of UNCLOS article 105.¹⁵² So the concerned states should exhibit a consistent willingness to try suspected pirates themselves whenever possible, but must also have the

146. See *United States v. Shi*, 525 F.3d 709, 720–21 (9th Cir. 2008); Indictment, *supra* note 132, at 1.

147. Indictment, *supra* note 132, at 2 (citing 18 U.S.C. § 2280 (1996)).

148. Kraska & Wilson, *supra* note 138, at 268–69; Jeffrey Gettleman, *Pirates in Skiffs Still Outmaneuvering Warships Off Somalia*, N.Y. TIMES, Dec. 16, 2008, at A6, available at 2008 WL 24053562.

149. *E.g.*, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *supra* note 76.

150. *E.g.*, Indictment, *supra* note 132.

151. Kontorovich, *supra* note 97.

152. See High Seas, *supra* note 49, art. 19; INT'L L. COMM'N, *supra* note 10, art. 43 cmt.

prerogative to pass on the suspects when they deem it necessary.

2. Transferring Suspected Pirates Elsewhere

The transfer of suspected pirates by the capturing state marks the focal point of the legal problem in modern piracy law. On one hand, as the *raison d'être* of universal jurisdiction,¹⁵³ piracy should be the archetypical crime for which any state can exercise jurisdiction. Conversely, numerous legal, political, and other forces converge on this issue to scare many states into inaction precisely when they must act with robust and forthright authority. Neither inaction nor determined action misguided by doubt and uncertainty will effectively bring an end to the modern piracy problem. Currently, states cite a “lack of political will”¹⁵⁴ to comprehensively address the problem while they bowl through the clouds of perceived uncertainty; sending suspects back to Somali shores or transferring them to Kenya, without cogently assessing the legal landscape.¹⁵⁵ Despite the prohibitive language in the commentary of the International Law Commission,¹⁵⁶ no legal proscription on transferring suspected pirates withstands scrutiny. States must recognize and acknowledge this fact.

The supposed prohibition on transfers might in fact be a paper tiger, and a toothless one at that. Geneva LOS and UNCLOS party members have not denounced the practice. Neither has the ITLOS issued an advisory opinion on the matter. Accused pirates have not yet asserted defenses that they were wrongly brought within the prosecuting state’s jurisdiction. Without the actual invalidation of a transfer, or at least an argument for it, states may be correct in their apparent lack of concern over the matter. Yet the language of the treaty provision—“[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed.”¹⁵⁷—remains susceptible to reasonable arguments against transfers.

A simple and straightforward interpretation suggests that the second clause of the commentary (“[t]his right cannot be ex-

153. Kontorovich, *supra* note 5, at 183.

154. Press Release, *supra* note 28.

155. *E.g.*, *Mission*, EU NAVFOR SOM., <http://www.eunavfor.eu/about-us/mission/?article2pdf=1> (last visited Apr. 29, 2011) (citing UNCLOS as its “Legal Basis” in support of its operating procedures relying on suspect transfers).

156. INT’L L. COMM’N, *supra* note 10, art. 43 cmt.

157. UNCLOS, *supra* note 6, art. 105; High Seas, *supra* note 49, art. 43.

exercised at a place under the jurisdiction of another State”) refers to the right of states to seize pirate ships on the high seas, and thus merely reiterates UNCLOS article 100.¹⁵⁸ Such an interpretation ignores the strong possibility that “and” conjunctively gives only the capturing state the right to have pirate ships adjudicated by its courts. The right to seize includes the right to adjudicate, neither of which can occur in another state’s territory. In the case of seizure, a capturing state cannot violate another’s territorial sovereignty. In the case of adjudication, another state cannot exercise this right in place of the capturing state. The fact that the commission chose not to use “or”—which would give any state the right to adjudicate piracy allegations, regardless of who captured the suspects—supports this possibility. Policy matters such as the need to prevent the mishandling of evidence, which becomes more likely during a transfer, might support the ban as well. The Geneva LOS drafters may have also written the article with a mind to protecting the rights of suspects against refoulement, the transfer of persons to a state in which they might be tortured.¹⁵⁹

States fighting piracy in the Gulf of Aden can address these policy concerns through multilateral agreements, and careful respect for due process, without completely eschewing the practice of transferring piracy suspects. Some scholars suggest that Security Council Resolution 1851 that authorizes shiprider agreements¹⁶⁰ cures the transfer prohibition altogether.¹⁶¹ Shiprider agreements permit law enforcement officers to sail on board ships flying the flag of another state, and to arrest pirates interdicted by those ships with the authority of their own state.¹⁶² No available evidence indicates that states currently use this authorization. The hope that shipriders could solve the UNCLOS capturing-state requirement constitutes yet another avoidance tactic. Placing an officer from one of the few states

158. Roach, *supra* note 89, at 404 (citing MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 877 (1962)).

159. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 2–3, Dec. 10, 1984, 1465 U.N.T.S. 85.

160. S.C. Res. 1851, *supra* note 106, ¶ 5.

161. *E.g.*, Isanga, *supra* note 93, at 1276.

162. See, *e.g.*, Eugene Kontorovich, *Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1202 (2009) (“[T]he ‘shiprider’ program[is] where a law enforcement officer from one country embarks on the other’s vessels, carrying the authority to board and make arrests in the name of his home state.”).

willing to prosecute suspected pirates on each naval ship patrolling the Gulf of Aden would present massive financial and logistical challenges. Patrolling the ocean is expensive enough without cruisers and destroyers having to make port to pick up officers from the Seychelles, for example. Multiplying the jurisdiction of ships avoids the real legal problem surrounding the relevance of UNCLOS as customary international law.

Furthermore, this proposal still fails to cure the UNCLOS prohibition. article 105 does provide that “every State may seize a pirate ship.”¹⁶³ This suggests that a shiprider acting as an agent of her state can arrest pirates, bring them to court, and dodge the difficult issues UNCLOS would otherwise present. Yet article 107 clarifies that only warships can make seizures.¹⁶⁴ The “State” referred to in article 105 thus means the flag state of the ship making the interdiction, not the state represented by the individual actor making arrests. Trying suspected pirates in the courts of the shiprider’s state would still violate UNCLOS article 105.

Despite the law of the sea provisions, capturing states that transfer suspects to another state can do so legally under a number of legal regimes. Indeed, “sufficient legal authority” exists.¹⁶⁵ Universal jurisdiction, as mentioned above, allows any state to capture and try suspected pirates. This could arguably include one state who conducts the capture and another the trial. Universal jurisdiction statutes generally provide jurisdiction over any specified illegal acts, not only acts for which the state itself apprehended the accused.¹⁶⁶

While universal jurisdiction remains a viable option, a transfer would not always require the receiving state to use it. A state with stronger ties to an act of piracy could avoid these questions by exercising its jurisdiction extraterritorially. For example, the state of which the suspected pirates are citizens could rightfully request a capturing state with no additional ties to the crime to turn over custody of the suspects.¹⁶⁷ The

163. UNCLOS, *supra* note 6, art. 105.

164. *Id.* art. 107.

165. *Id.*

166. See, e.g., Merchant Shipping Act, (2009) Cap. 4 § 371 (Kenya) (“Any person who commits any act of piracy; in territorial waters, commits any act of armed robbery against ships shall be liable, upon conviction, to imprisonment for life.”).

167. A rare actual example of this occurred between the German and Dutch governments. See *Pirate Who ‘Wanted to Kill Americans’ Gets 33 Years for Hijacking U.S. Ship*, MSNBC.COM, Feb. 16, 2011, <http://www.msnbc.msn.com/>

SUA provides jurisdiction for some piracy offenses in which state parties establish a nexus to the action through extraterritoriality. Additionally, many states have statutes permitting them to exercise extraterritorial jurisdiction over piracy.¹⁶⁸ None of these laws require the capturing state to retain custody and try the suspects in its courts, and each provides it with flexible and efficacious options for dealing with them.

Transfers based on either form of jurisdiction would also adequately address any policy concerns surrounding the transfer proscription. Even a receiving state that exercises universal jurisdiction will have a sophisticated court system sufficient to handle complex evidence and even conduct further investigation itself when necessary. The actual agreement between Kenya and the EU carefully outlines how the parties must handle evidence.¹⁶⁹ As evidenced by the title of that document, it also takes care to prevent the possibility of refoulement, specifically mentioning a focus of the agreement on the treatment of transferred suspects. Future agreements between other states, and even the larger comprehensive regional agreements on piracy advocated for by many scholars,¹⁷⁰ should include similar provisions. Ensuring proper transfer procedures would obviate the need for an overbroad ban on all transfers.

The policies behind this supposed ban may also give way to more significant concerns. The threat to the continued relevance of UNCLOS as a reflection of customary law might encourage its state parties to drop the ban in order to avoid jeopardizing their monumental agreement. Although one might argue that the right to fair trial and freedom from torture of captured pirates outweighs this concern, permitting flexible responses to piracy unhindered by the transfer ban will prevent harm to other individuals. The threat piracy poses to international security, and the loss of life caused by pirates, also override policy arguments in support of ban. Current state practices support this view.

No state that has conducted a transfer has clearly stated that it has done so under the widely recognized and historically foundational principles of universal jurisdiction, or in order to

id/41615693/ns/us_news-crime_and_courts (“[T]he Dutch extradited 10 alleged pirates to Germany to stand trial for trying to seize a German cargo ship.”).

168. *E.g.*, 18 U.S.C. § 7 (2001) (defining the special territorial and maritime jurisdiction of the United States).

169. Exchange of Letters, *supra* note 112.

170. *E.g.*, Skaridov, *supra* note 35, at 496.

permit a trial in a state with the strongest jurisdictional nexus. Undertaking what ought to be an acceptable—though not ideal—practice in this way fails to establish clear state practices based on justifiable interpretations of international law. It simply skirts these issues because they are “complex.” If the complexity lies in law of the sea provisions that the drafters interpreted in a manner contradictory to universal jurisdiction, SUA’s “punish or extradite” provisions,¹⁷¹ and current practices, then states must acknowledge that fact and commit to endorsing the internationally acceptable bases of the authority for antipiracy activities.

III. ESTABLISHING A FRAMEWORK FOR ADDRESSING PIRACY TODAY REQUIRES CLEAR LAWS AND LEGAL PRIORITIES

Comprehensive responses to modern piracy problems, in the face of difficult but approachable legal challenges, require a clear legal framework for assessing and prioritizing the competing forces at issue. Although most of the relevant international legal instruments and domestic precedents provide reasonably discernable direction as to the salient factors states must assess when approaching this problem, defeating the modern piracy threat will require states to apply these in a uniform response with unambiguous guidelines. Such a response must consider the interactions between universal and extraterritorial jurisdiction; the SUA, UNCLOS, and Geneva LOS Conventions; and piracy’s place in history in order to prescribe necessary changes in law and state practices. Consistent action by all states involved will require a framework by which to assess competing claims to jurisdiction, which will necessarily call for reinterpretation of the law of the sea conventions.

A. THIRD-PARTY STATES’ EXERCISE OF TRUE UNIVERSAL JURISDICTION

Consistent with historical rhetoric decrying pirates as *hostis humanis generis*, the modern piracy challenge requires the exercise of universal jurisdiction in some cases. The transfers of suspected pirates to Kenya or other third parties—which have not yet possessed stronger claims to jurisdiction at the time of capture than Somalia or other states—reflect as much. However, transferring and receiving states do not adequately justify

171. Convention for the Suppression of Unlawful Acts, *supra* note 99, art. 7.

their actions. Sufficient legal justification in both international and domestic laws exists to do so.

Critics of this practice may argue that universal jurisdiction for piracy does not enjoy concrete precedential support.¹⁷² Jurisdiction in the United States over a suspected pirate or act of piracy historically required some nexus.¹⁷³ Even one of the United States' first antipiracy statutes provided no jurisdiction for robbery at sea without links to U.S. territory or citizens.¹⁷⁴ Some argue that universal jurisdiction should not play a role in maritime piracy because it violates due process and state sovereignty, and has the potential to cause international tensions.¹⁷⁵ The due process concerns, however, rest on the fear of inadequate notice about which state's laws will apply to captured pirates. And even the pirates themselves claim to have notice of the relevant laws as they boast of their own impunity.¹⁷⁶ Moreover, the Internet now provides global access to the relevant treaties and court practices. At the current stage in the struggle against modern piracy, perpetrators have adequate notice.

States exerting judicial power over foreign citizens who did not put themselves at the mercy of their laws do so over the sovereign interest of that citizen's country. For example, Belgium repealed its universal jurisdiction statute after significant international backlash.¹⁷⁷ In the piracy context, however, states appear more eager to outsource prosecution than to pursue any sovereign interests against suspects. The concern that exercising universal jurisdiction over accused pirates could foment international tensions ignores the fact that the U.N. Security Council, NATO, the EU, and several Asian and African states actively involve their diplomats, navies, and courts in the fight against piracy. The world has united around this problem since the tensions argument first surfaced. Stronger legal justifications for applying universal jurisdiction in this context also exist.

172. *E.g.*, Goodwin, *supra* note 21, at 984.

173. *See* Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113.

174. *Id.*; *see also* United States v. Furlong, 18 U.S. (5 Wheat) 184, 188 (1820); United States v. Palmer, 16 U.S. (3 Wheat) 610, 621 (1818); United States v. Kessler, 26 F. Cas. 766, 768 (C.C.D. Pa. 1829).

175. *E.g.*, Goodwin, *supra* note 21, at 1004.

176. *See* Gettleman, *supra* note 148 ("Even if foreign navies nab some members of his crew, [the pirate] said, he is not worried . . . 'We know international law,' [he] said.")

177. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 691–92 (2d ed. 2006).

One justification might suggest that, despite the evidence that states traditionally exercise true universal jurisdiction in theory only, some recognition of it in appropriate piracy cases could be a positive development. Somalia would not likely challenge, for example, Kenya's trial and detention of Somali nationals because the TFG has demonstrated an inclination to cooperate internationally.¹⁷⁸ Kenya's discretionary application of its universal jurisdiction statute¹⁷⁹ could significantly reduce the number of pirate attacks around Somali waters by facilitating antipiracy enforcement and deterrence. It fulfills a very real need to create local deterrents to illegal actions.¹⁸⁰ It aligns with the historical rhetoric, though arguably not practice, that piracy is a universally punishable crime. Furthermore, since the international community construed the availability of universal jurisdiction for piracy as a justification for extending it to genocide and such,¹⁸¹ actually vindicating this original purpose lends a previously absent credibility to the foundation of modern, universally cognizable offenses. Looking forward, such practices can build a credible deterrent to illegal acts of piracy.

B. LONG-TERM PRIORITIES MUST INFORM CONSISTENT, UNIFIED ACTION

Applying universal jurisdiction to pirates serves its original purpose to provide a reliable legal response to crimes that harm all nations.¹⁸² However, states currently overlook too many other factors when they use it as their default mechanism in order to avoid the ostensible complexities of international law and piracy. Transfers to states that will exercise universal jurisdiction should be permissible, but this should not remain the primary and preferred course of action. There must be limits to universal jurisdiction. The lack of real precedent applying universal jurisdiction in piracy cases should caution

178. S.C. Res. 1851, *supra* note 106; S.C. Res. 1816, *supra* note 28.

179. Merchant Shipping Act, (2009) Cap. 4 § 371 (Kenya) ("Any person who commits any act of piracy; in territorial waters, commits any act of armed robbery against ships shall be liable, upon conviction, to imprisonment for life.").

180. James Kraska, *Developing Piracy Policy for the National Strategy for Maritime Security*, in LEGAL CHALLENGES IN MARITIME SECURITY, *supra* note 35, at 331, 358 ("This type of local action is particularly beneficial . . .").

181. See *supra* notes 67–71 and accompanying text.

182. See Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 645 (2010) ("Thus, international criminal law originated with universal jurisdiction over piracy, the quintessential transnational crime.").

states into applying it only as a last resort, to deter criminals who assume their own impunity. Rather than transferring suspected pirates to an uninvolved third party that will apply its universal jurisdiction statute, states must agree to establish clear preferences that allow those with the strongest jurisdictional claims to exercise them first.

Indeed, this is the logic behind the concept of extraterritorial jurisdiction.¹⁸³ Even the SUA convention's differentiation between requiring parties to establish territorial and nationality jurisdiction, while permitting discretionary jurisdiction in cases of passive personality or protective principles, reflects an ordinal jurisdictional preference based on the strength of a nexus.¹⁸⁴ Different forms of jurisdiction exist in order to permit states with weaker links to prosecute serious crimes when they must. They are not meant to facilitate prosecution in the most convenient venue.¹⁸⁵

In terms of piracy in the Gulf of Aden and Indian Ocean, Somalia should have an opportunity to establish jurisdiction over offenses involving its nationals. Actors and commentators in this struggle against piracy recognize the fact that a real solution to the problem lies in strengthening Somali institutions.¹⁸⁶ Allowing the TFG in Somalia to play a role in punishing its own citizens will provide a much-needed measure of legitimacy to its government, and can effectively address this problem at its root. A successful international response must place this at the top of its priorities, and recognize that Somalia will possess the strongest jurisdictional claims in the majority of piracy cases.

Valid doubts about Somalia's ability to effectively engage this problem abound. Reports indicate that current efforts at imprisoning those convicted of piracy in Somalia have experienced some failings.¹⁸⁷ However, capacity-building partner-

183. See Convention for the Suppression of Unlawful Acts, *supra* note 99, art. 6 (outlining the bases of obligatory and discretionary jurisdiction, which reflect stronger and weaker connections to the alleged crime, respectively).

184. See Glen Plant, *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 39 INT'L & COMP. L.Q. 27, 45-46 (1990).

185. Telephone Interview with Eugene Kontorovich, Professor, Nw. Univ. Law Sch. (Nov. 6, 2009).

186. *E.g.*, Kaplan, *supra* note 3.

187. *Judge Shot Dead in Somalia*, AL JAZEERA, Nov. 12, 2009, <http://english.aljazeera.net/news/africa/2009/11/20091112125358501502.html> (reporting the fatal shooting of a judge who had convicted pirates and members of the al-Shabab rebel group).

ships to support the rule of law will bolster local civil capital and strengthen legitimacy at the grass-roots level by providing positive results in Somali coastal communities.¹⁸⁸ Current collaboration between the Western naval forces and legitimate Somali law enforcement appear to have experienced some success.¹⁸⁹ Moreover, doubts about the efficacy or even existence of a court system in parts of the country ignore reports that some courts in Somalia are trying, convicting, and imprisoning pirates.¹⁹⁰ While information about these trials and detentions is scarce, there are no documented reports of refoulement or corporal punishments under Shari'ah law.

Placing trial in Somalia at an equal level of preference to trial in the territory of the capturing state, within the quantitative capacity of its courts, will thus facilitate the goal of addressing piracy at its root causes. No other methods currently practiced or suggested can as completely accomplish this goal. Transfers to states exercising universal jurisdiction are neither swift nor certain—because of time required for transfer and significant backlogs of many developing world courts—and thus fail to provide an adequate deterrent in Somalia.¹⁹¹ Trials by the capturing state may have similar shortcomings because of the time required to bring in suspects and witnesses.¹⁹²

Alternatively, commentators have called for the creation of a regional or international piracy tribunal.¹⁹³ This would not solve any of the major problems causing piracy or impairing

188. See Kaplan, *supra* note 3.

189. *NATO Works with Somali Authorities*, OPERATION OCEAN SHIELD (Sept. 24, 2009), http://www.manw.nato.int/page_operation_ocean_shield.aspx#NATO_works_with_Somali_authorities.

190. Jeffrey Gettleman, *Rounding Up Suspects, The West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES, Apr. 24, 2009, at A8, available at 2009 WLNR 7699213 (“[I]n Somalia, a stable legal framework doesn’t exist.”); cf. Jehad Nga, *Somalia’s Face of Modern Piracy*, TIME.COM, Nov. 12, 2008, <http://www.time.com/time/photogallery/0,29307,1858572,00.html> (documenting the imprisonment of pirates in Somalia through photographs); *Pirate Ringleader Faces Execution in Somalia*, BBC NEWS, Sept. 28, 2010, <http://www.bbc.co.uk/news/world-africa-11426560>.

191. Caninas, *supra* note 38, at 19–20.

192. Kontorovich, *supra* note 90, at 265; see also James Kraska & Brian Wilson, *Fighting Pirates: The Pen and the Sword*, 25 WORLD POL’Y J. 41, 45–46 (2008), available at <http://www.mitpressjournals.org/doi/pdf/10.1162/wopj.2009.25.4.41?>

193. See Craig Thedwall, *Choosing the Right Yardarm: Establishing an International Court for Piracy*, 41 GEO. J. INT’L L. 501, 517 (2010); *Medvedev Calls for Piracy Tribunal*, RADIO NETH. WORLDWIDE (Nov. 20, 2009), <http://www.rnw.nl/english/article/medvedev-calls-pirate-tribunal>.

responses to it. The expense and time required to build and establish a facility with judges, prosecutors, and staff could more effectively go to strengthening existing institutions in Somalia or Kenya, where European donors have in fact applied such resources.¹⁹⁴ The domestic courts of interested states are capable of trying suspected pirates,¹⁹⁵ and with continued progress they can acquire an equal or better capacity to fulfill this role by the time an international court could be established. Even if creating an international tribunal became a viable option, the problem of surrendering custody of suspects will remain with the UNCLOS prohibition on transfers still in place.

If—after a thorough analysis of the relevant laws, precedent, and policies—states agree that a series of best practices can include transfers to uninterested parties in some instances, then they must consider the ramifications of that choice for UNCLOS. Pursuing this course of action despite the possibility that UNCLOS prohibits it,¹⁹⁶ without amending or distinguishing the convention, could significantly undermine its status. Simple remedies exist. An advisory opinion by the ITLOS clarifying the matter could suffice as a binding decision on state parties.¹⁹⁷ The tribunal could determine that UNCLOS poses no barrier to transfers of suspected pirates, perhaps under certain conditions. If it decided otherwise, state parties could add reservations, understandings, or declarations to their signing and ratification. Barring these avenues of recourse, state parties could propose an amendment to the text of article 105 itself.¹⁹⁸ Changing the language of that provision would nullify the effect of the commission's commentary. Such amendments might include language similar to SUA's punish or extradite provision. They might add to the current clause allowing the courts of the capturing state to determine punishment by also allowing it to determine *whether* to punish or extradite to a state with a *stronger* jurisdictional claim.

194. See Gettleman, *supra* note 190, at A8.

195. See, e.g., Indictment, *supra* note 132.

196. See INT'L L. COMM'N, *supra* note 10, art. 43 cmt.

197. Rules of the International Tribunal for the Law of the Sea art. 138, Mar. 17, 2009, ITLOS/8 (enacted pursuant to UNCLOS, *supra* note 6, Annex VI, art. 16) (“The Tribunal may also give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.”).

198. UNCLOS, *supra* note 6, arts. 312–15.

From the eventual resolution of this matter, several positive developments would result. Making UNCLOS compatible with state practice and the other related instruments would promote the creation of clear legal guidelines for addressing piracy. Such guidelines would enable swift and effective punishment for convicted pirates in order to provide an effective deterrent for other would-be pirates. Stemming the creation of new pirates while imprisoning the current ones would eventually stop the growing trend of pirate attacks in the waters off Somalia. This would further prevent terrorist groups from making inroads to this lucrative and dangerous criminal enterprise, making seamen and other civilians safer. Increased safety will result in reduced loss of life, injury, and pain and suffering of pirate victims and their families. Moreover, the creation of an effective coordinated response to piracy based on such a legal framework would ease the huge financial burdens this problem imposes on shipping.

CONCLUSION

With the resurgence of piracy now raging off the coast of Somalia, states must confront the unexpected challenges of applying new laws, which often overlap, and historic legal remedies to an ancient problem that now bears a modern face. The very real costs that pirates exact on today's international community render unacceptable purported solutions based on expedience rather than sound legal reasoning.

Lessons from the past can inform a comprehensive response. Such a response should necessarily include the current vigorous military action and increased engagement with regional actors, in order to stifle acts of piracy both at their roots and when they come to fruition. Most importantly, this collaboration must focus on the available legal tools such as extraterritorial and universal jurisdiction, and the UNCLOS and SUA conventions. These instruments are tools, not hindrances, when properly understood. Creating a mutually agreeable prioritization of jurisdiction, especially acknowledging the claims of those states with the strongest links to the crime, will require only a sober consideration of these factors. The potential benefits of a streamlined and truly effective mechanism for creating consequences to violent criminal acts at sea far outweigh the actual challenge of its creation.